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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 749

GREAT LAKES STEEL CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

INTERVENING RAILROADS' MOTION TO AFFIRM

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 6295

GREAT LAKES STEEL CORPORATION, A Delaware Corporation,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee,

AND

INTERSTATE COMMERCE COMMISSION, ET AL.,

Intervening Defendants-Appellees.

INTERVENING RAILROADS' MOTION TO AFFIRM

Interveners, The Baltimore and Ohio Railroad Company, Erie Railroad Company and The Pennsylvania Railroad Company, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed upon the ground that this appeal presents no substantial question.

This is a direct appeal from the final judgment of a three-judge District Court (established pursuant to the Urgent Deficiencies Act of October 22, 1913) dismissing a complaint brought by appellant to set aside an order of the Interstate Commerce Commission. The Commission's order denied appellant's claim against the railroad companies for a refund of freight charges which were alleged

to be in excess of those lawfully applicable under tariffs filed with the Interstate Commerce Commission. The transportation involved consisted of shipments of iron and steel by appellant from various producing points to Mansfield, Ohio, where they were fabricated by Great Lakes into sections of Quonset huts and sold to the United States Government. The Government, in turn, shipped the fabricated articles on Government bills-of-lading to various naval bases, paying—in instances in which the charges have been paid—the applicable freight rates from Mansfield to destination as reduced by land grant deductions in favor of the Government on some of the shipments and, on others, by special rates available only to the Government under Section 22 of the Interstate Commerce Act.

Appellant contended that the shipments to and from Mansfield should have been treated as single through shipments and that, instead of the separate charges to and from Mansfield, the shipments were entitled, under the carriers transit tariffs, to the through rate from the origin of the steel to the ultimate destination of the fabricated products.

In denying appellant's claim the Commission said (264 I. C. C. 781):

> "The question for determination in this proceeding is whether the movements to and from Mansfield were separate and independent shipments or constituted one continuous through movement under the provisions of the governing transit tariffs. The contents of the shipments from Mansfield were the property of the Government as soon as they were loaded on the cars at that point, and the Government was interested only in the transportation service from Mansfield. It was the purpose of the Navy Department to make new shipments from Mansfield, independent of the in-bound movements."

After stating that the theory of transit "is that there is a continuous movement from point of origin to ultimate

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destination" the Commission concluded (264 I. C. C. 781):

> "The continuity of the shipments under consideration was terminated at the transit point when the Navy Department, which became the owner of the goods when they were loaded on the cars at Mansfield, elected to ship them from that point as separate and independent shipments. Control of the shipments from the transit point passed from complainant to the new owner (the Navy Department), who paid, or will pay, freight charges on the basis of the rates as modified by Section 22 quotations or subject to land-grant deductions, from transit point to final destination. Complainant, having lost control of the goods, could not restore the continuity of the shipments, and is not entitled to readjustment of the charges on the basis of the through rates from points of origin to the final destination."

Appellant's petition for reconsideration was denied by the Commission, and thereafter appellant filed this suit.

In addition to answering on the merits, the United States, the Interstate Commerce Commission and intervening railroad defendants challenged the jurisdiction of the lower court to entertain the action. The matter was heard on both the jurisdictional issue and the merits. The District Court sustained the pleas to the jurisdiction and entered judgment accordingly. This appeal followed.

I. Jurisdiction

Appellant filed its complaint with the Commission under the authority of Section 9 of the Interstate Commerce Act. This section provides that a claim for damages against carriers subject to the Act may be asserted by complaint to the Commission or by a suit in any district court of competent jurisdiction; but it also provides that a party "shall not have the right to pursue both of said remedies, and must

in each case elect which one of the two methods of procedure herein provided he or they will adopt."

This Court has consistently held that there is no review under the Urgent Deficiencies Act of an order of the Commission denying a petition for damages. In *Standard Oil Co.* v. *United States,* 283 U. S. 235, the suit was brought under the Urgent Deficiencies Act to annul an order of the Commission which dismissed two complaints to recover damages on the ground that the legally applicable rates had not been applied to the transportation in question. This Court held that under the provisions of Section 9 of the Interstate Commerce Act requiring an election of remedies the three-judge court had no jurisdiction. This case was followed by *Allison & Co.* v. *United States,* 12 F. Supp. 862, 863-4 (S. D. N. Y.), affirmed *per curiam,* 296 U. S. 546. While *Rochester Telephone Corp.* v. *United States,* 307 U. S. 126, overruled the "negative order" doctrine, the opinion showed that the main basis for the decision in the *Standard Oil* case was the statutory scheme dealing with reparations and not the negative order doctrine (307 U. S. at p. 140, Note No. 23). Subsequent cases have clearly shown that the District Court lacks jurisdiction in this type of case. *Atlantic Lumber Corp.* v. *Southern Pacific Co.,* 47 F. Supp. 511, 514 (D. C., Oregon); *Ashland Coal & Ice, Inc.* v. *United States,* 61 F. Supp. 708 (N. D., Va.); affirmed *per curiam,* 325 U. S. 840. In this Court's affirmance of the *Ashland* case, the *Standard Oil* case and the *Allison* case were cited as authorities.

This is not the type of case in which the appellant was required to submit its claim to the Commission under the doctrine of primary jurisdiction. There was no question here as to the reasonableness of any rate or rule, no question as to discrimination or undue prejudice. There was, in short, no administrative question for determination. The question was whether the appellants had been charged more than the amount specified in tariffs filed with the

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I. C. C. Moreover, there was no claim that any words in the tariffs were used "in a peculiar meaning" or that "extrinsic evidence" was necessary to determine their meaning, thus requiring preliminary resort to the Commission. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. On the contrary, as the District Court pointed out, "the case at bar involves an aplication of certain unambiguous tariffs . . . "

This case, therefore, does not involve the question recently argued before the Court in *United States* v. *I. C. C.*, October Term 1948, No. 330, as to whether the above-cited decisions involving election of remedies should be overruled with respect to situations in which the doctrine of primary jurisdiction requires resort to the Commission in the first instance.

The appellant contended in the District Court that a right of review of reparation orders is granted by the Administrative Procedure Act, independent of the Urgent Deficiencies Act. That Act provides that any person shall be entitled to judicial review of agency action "except so far as (1) statutes preclude judicial review . . . " Section 9 of the Interstate Commerce Act has long been construed as precluding judicial review where an election was made to proceed before the Commission. Hence the Administrative Procedure Act confers no right to review in this case. *Kirkland* v. *Atlantic Coast Line R. Co.*, 167 F 2d 529 (C. A. D. C.).

The District Court's opinion deals fully with these jurisdictional questions. There are no substantial questions to invoke this Court's jurisdiction of the appeal.

II. The Merits

It will not be disputed that the Commission had before it a deposition by the Naval Officer in charge of the shipments from Mansfield that the Navy intended to make new and independent shipments from that point. (By doing

so it was able to get favored rates under Section 22 of the Interstate Commerce Act—which allows lower-than-tariff rates to the United States and certain others—and under the land grant statutes which were then in effect and which operated to reduce charges on Government shipments only). Again, it will not be disputed that the transportation from Mansfield to destination took place under Government bills-of-lading, i. e., contracts of transportation to which the only parties were the Government and the railroads and to which, therefore, Great Lakes was a stranger. These facts, in themselves, show that there was substantial evidence to support the Commission's finding that the appellant lost control of the shipments at Mansfield and that the shipments from Mansfield were new and independent shipments unrelated to the transportation to Mansfield.

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